AMER RECORDS AND BRIEFS

No. 06-457

Supreme Court, U.S.
FILED
NOV 29 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., AND VERMONT TRUCK & BUS ASSOCIATION, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Tel.: (415) 268-7000
Fax: (415) 268-7522

BETH S. BRINKMANN
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
Tel.: (202) 887-1544
Fax: (202) 887-0763

Counsel for Respondents

November 29, 2006

LIBRARY OF CONGRESS
LAW LIBRARY

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether provisions of the Maine Tobacco Delivery Law that regulate whether and how cargo carriers may provide transportation and delivery services for tobacco products are "law[s] related to a price, route, or service" of such carriers and, therefore, fall within the preemption provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

None of the respondents, the New Hampshire Motor Transport Association, the Massachusetts Motor Transportation Association, Inc., or the Vermont Truck & Bus Association, Inc., has a parent corporation and no publicly-held company owns 10% or more of the stock of any of the respondents.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT.... ii

TABLE OF AUTHORITIES v

STATEMENT 1

1. The Federal Aviation Administration Authorization Act of 1994 (FAAAA) 1
2. The Maine Tobacco Delivery Law 1
3. Effects of the challenged provisions on commercial carriers 3

REASONS WHY THE PETITION SHOULD BE DENIED 4

A. THERE IS NO CONFLICT IN THE LOWER COURTS AS TO THE PREEMPTIVE EFFECT OF THE FAAAA ON STATE TOBACCO LAWS THAT EXPRESSLY REGULATE CARRIERS' TRANSPORTATION AND DELIVERY OF GOODS 6

1. The Purported Disagreement Between The Decision Below And Rulings Of The Ninth And Second Circuits Is Illusory 6

a. The state laws at issue in the decisions of the Ninth and Second Circuits did not regulate a carrier's transportation or delivery of goods 7

b. Petitioner has not shown that this case would have a different result in a different circuit 8

TABLE OF CONTENTS – Continued

Page

2. The District Court And Intermediate State Appellate Court Decisions Cited By Petitioner Do Not Justify Further Review 12

B. REVIEW IS INAPPROPRIATE BECAUSE PETITIONER'S CLAIM THAT MAINE HAS NO EFFECTIVE MEANS TO COMBAT MINORS' ACCESS TO TOBACCO IS NOT SUPPORTED BY THE RECORD BELOW AND IGNORES AVAILABLE MEANS OF REGULATING TOBACCO SELLERS 14

C. THE FIRST CIRCUIT CORRECTLY HELD THAT THE FAAAA PREEMPTS MAINE'S REGULATION OF CARRIERS' SERVICES 18

1. Section 1555-C(3)(C) And The Imputed Knowledge Provision Of Section 1555-D Are Related To Carriers' Transportation And Delivery Services 18

2. The Challenged Provisions Are Preempted Even Though Enacted In Part To Promote Health 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Ace Auto Body & Towing, Ltd. v. City of N.Y., 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999) 8, 9

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 23

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 23

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 22

California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997) 9, 10, 11

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999) 7, 8, 12

City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002) 23, 24

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 11

English v. General Elec. Co., 496 U.S. 72 (1990) 19

Granholm v. Heald, 544 U.S. 460 (2005) 17

Louisville & Nashville R.R. v. F.W. Cook Brewing Co., 223 U.S. 70 (1912) 17

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) ..... *passim*

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 11

TABLE OF AUTHORITIES – Continued

Page

New York State Motor Truck Ass'n v. Pataki, No. 03-CV-2386, 2004 WL 2937803 (S.D.N.Y. Dec. 17, 2004) 13

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) 22

Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 24

Robertson v. Washington State Liquor Control Bd., 10 P.3d 1079 (Wash. Ct. App. 2000) 14, 17

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 22

United States v. James, 478 U.S. 597 (1986) 23

Ward v. State of N.Y., 291 F. Supp. 2d 188 (W.D.N.Y. 2003) 13

FEDERAL CONSTITUTION AND STATUTES

U.S. Const. amend. XXI, § 2 17

Federal Aviation Admin. Auth. Act of 1994, Pub. L. No. 103-305, Title VI, 108 Stat. 1569
§ 601(a)(1)(A)-(B) 1
§ 601(b)-(c) 1

29 U.S.C.
§ 1144(a) 9

42 U.S.C.
§ 300x-26 24

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C.
§ 5125 22
§ 14501(c)(1) 1, 21
§ 14501(c)(2)(A) 22
§ 14504 22
§ 30103(b) 22
§§ 31111-31113 22
§§ 31131-31147 22
§ 41713(b)(1) 18
§ 41713(b)(4)(A) 1, 21
§ 41713(b)(4)(B)(i) 22

STATE STATUTES

2003 Me. Laws 444 ..... 1, 10

Me. Rev. Stat. Ann. tit. 22,
§ 1551(1-B)(B) 2, 10
§ 1551(1-C) 2
§ 1555-C(1)-(2) 3, 15
§ 1555-C(3)(B) 3, 15
§ 1555-C(3)(C) ..... *passim*
§ 1555-C(4) 3, 15, 16
§ 1555-C(5) 16
§ 1555-D ..... *passim*
§ 1555-D(1) 2, 10

OTHER AUTHORITY

H.R. Conf. Rep. No. 103-677 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715 ..... 1, 19, 21, 23

STATEMENT

1. The Federal Aviation Administration Authorization Act of 1994 (FAAAA). Through the preemption provisions of the FAAAA, Congress has provided that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service" of any motor carrier, air carrier, or intermodal air/ground carrier with respect to the transportation of property. FAAAA, Pub. L. No. 103-305, Title VI, § 601(b)-(c), 108 Stat. 1569, 1605-1606 (1994) (currently codified at 49 U.S.C. § 14501(c)(1) (motor carriers); 49 U.S.C. § 41713(b)(4)(A) (air and intermodal carriers)).

In enacting the FAAAA, Congress expressly found that state regulation of the transportation of property had "imposed an unreasonable burden on interstate commerce [and] impeded the free flow of trade, traffic, and transportation of interstate commerce." *Id.* § 601(a)(1)(A)-(B), 108 Stat. at 1605. Congress enacted the FAAAA preemption provisions to free all air, motor, and intermodal cargo carriers from a "patchwork of regulation" by the several States. H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. The House Conference Report explained: "The sheer diversity of [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Ibid.* In particular, state restrictions on the "*types* of commodities carried" were identified as a form of state regulation that had interfered with the ability of carriers to provide uniform services. *Id.* at 86 (emphasis supplied).

2. The Maine Tobacco Delivery Law. The provisions of Maine law at issue in this action were enacted as part of "An Act to Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors" (Maine Tobacco Delivery Law). 2003 Me. Laws 444.

Section 1555-D of that Act, entitled the "Illegal Delivery of Tobacco Products," has two components: One prohibits the "knowing[ ] transport[ation]" of tobacco

products "purchased from a person who is not licensed as a tobacco retailer" in Maine to anyone in Maine other than a licensee. Me. Rev. Stat. Ann. tit. 22, § 1555-D. The other component provides that a person is "deemed to know that a package contains a tobacco product" if the package is marked as containing tobacco or if the shipper of the package is "listed as an unlicensed tobacco retailer" by the Maine Attorney General.[1] *Ibid.* The Attorney General maintains lists of licensed tobacco retailers and known unlicensed tobacco retailers in order to provide those lists "to a delivery service." *Id.* § 1555-D(1).[2]

Another provision of the state law, Section 1555-C(3)(C) addresses the manner in which a delivery service – i.e., a commercial carrier of property – must provide its service in order to comply with the requirements of Maine law governing "delivery sales" of tobacco products. *Id.* § 1555-C(3)(C). Under Maine law, a "delivery sale" of tobacco products occurs whenever there is a sale "to a consumer in [Maine] when * * * [t]he tobacco products are delivered by use of a delivery service." *Id.* § 1551(1-B)(B). Section 1555-C(3)(C) requires that, when "shipping" a delivery sale, the seller must use a delivery service that imposes the following requirements: "(1) the purchaser must be the addressee; (2) the addressee must be of legal age to purchase tobacco products and must sign for the package"; and (3) an addressee under twenty-seven years of age "must show valid government-issued identification" that establishes the addressee to be of legal age to purchase tobacco products. *Id.* § 1555-C(3)(C).

[1] Although petitioner describes Section 1555-D as prohibiting carriers from "delivering tobacco products to children" (Pet. 14), that provision actually prohibits transportation and delivery of tobacco products purchased from unlicensed retailers (unless the recipient itself is a Maine licensee) without regard to whether the delivery is to a minor.

[2] A "[d]elivery service" is a commercial carrier of property, i.e., "a person * * * who is engaged in the commercial delivery of letters, packages or other containers." Me. Rev. Stat. Ann. tit. 22, § 1551(1-C).

The Maine Tobacco Delivery Law also provides other means of regulating delivery sales of tobacco, such as licensing, age verification, and reporting requirements for vendors, and restrictions on forms of payment. *Id.* §§ 1555-C(1)-(2), 1555-C(3)(B), 1555-C(4). Respondents did not challenge these additional requirements and the court of appeals below held only that Section 1555-C(3)(C) and the imputed knowledge component of Section 1555-D are preempted. Pet. App. 22-28.

3. Effects of the challenged provisions on commercial carriers. Respondents, which are trade associations of commercial carriers of property, demonstrated the effects of Section 1555-C(3)(C) and Section 1555-D on carriers' transportation and delivery services through uncontroverted evidence provided by their member UPS.

Each of the provisions of the Maine Tobacco Delivery Law that the court of appeals held preempted has a significant effect on UPS's transportation and delivery services. Section 1555-C(3)(C) mandates that tobacco retailers use carriers that require *the addressee* to sign for the packages. UPS's standard nationwide service, however, is to deliver to mail room attendants, receptionists, or other persons (or on request, other adults) at the delivery address. If UPS delivery drivers made personal delivery only to addressees, drivers would have to spend considerably more time at delivery stops in order to determine whether the named addressee was available and, if so, then to wait for that person to sign for the package. Pet. App. 64-65. Also, requiring carriers to identify the contents of a package to determine if special delivery procedures are required, and then to implement those procedures for deliveries of tobacco products, "causes carriers' drivers to alter their delivery practices for packages in Maine containing tobacco products, and can delay delivery of the package with tobacco products and subsequently delivered packages." *Ibid.* Accordingly, UPS determined that complying with Section 1555-C(3)(C) "would not be feasible" and "stopped delivering all tobacco products to Maine consumers." *Id.* at 5.

UPS must further alter its transportation and delivery services in order to comply with Section 1555-D by: (1) looking for markings regarding the package contents and reading names of the addressee and/or shipper for indications that a package contains tobacco products; (2) researching whether the addressee of an identified package is a Maine licensee; and (3) preventing delivery of any such package shipped to an unlicensed recipient. *Id.* at 56-57; *see also id.* at 5-6.[3]

UPS now maintains a nationwide policy of prohibiting shipments of cigarettes for delivery to consumers. But even that blanket policy would be insufficient under Maine law if the challenged provisions were not preempted. UPS would face penalties if it failed to intercept a package shipped in violation of its cigarette policy or if it transported and delivered non-cigarette tobacco products from unlicensed retailers. The court of appeals correctly held, however, that the FAAAA preempts the challenged provisions and precludes such penalties.

REASONS WHY THE PETITION SHOULD BE DENIED

This case involves express preemption by a federal statute of state laws that are "related to a [cargo carrier's] price, route, or service," including the provisions of the Maine Tobacco Delivery Law at issue here, which regulate whether and how carriers may lawfully transport and

[3] Petitioner erroneously asserts that UPS incurred costs of researching only thirty-three packages believed to contain tobacco products. Pet. 11. The record established that UPS had determined that thirty-three of the packages it had researched were undeliverable; however, the costs of research are incurred as to every package that is identified as containing tobacco products, not just for packages determined to be undeliverable. *See* Statement Of Undisputed Material Facts In Support Of Plaintiffs' "As Applied" Motion For Summary Judgment ¶ 90; Plaintiffs' Opposition To Defendant's Statement Of Undisputed Material Facts In Support Of Motion For Summary Judgment, Including Plaintiffs' Additional Undisputed Material Facts ¶ 126.

deliver tobacco products in Maine. The court below correctly held that the challenged provisions of Maine law imposed substantial burdens on carriers' transportation and delivery services for all packages shipped to Maine, regardless of their content, and thus unquestionably were "related to" carriers' service and could not survive federal preemption under the FAAAA.

There is no reason for this Court to grant review. The court of appeals' ruling is in accord with, and in fact relies upon, the few federal district courts and state courts that have addressed this issue, and petitioner's proffered split of circuit authorities does not exist. Neither of the circuit authorities petitioner cites is germane to the instant dispute. Rather, those rulings involve generally applicable prevailing wage laws and local regulation of tow truck safety and insurance, not laws explicitly directed to the manner in which carriers provide transportation and delivery services. Indeed, the absence of any conflict is made plain by the fact that petitioner has not demonstrated, and cannot demonstrate, that the decision below would be any different had it arisen in either of the other federal courts of appeals he cites.

Review here is particularly inappropriate because petitioner failed to raise adequately below an issue he now deems a critical justification for *certiorari*. Petitioner contends that the decision below leaves Maine defenseless against the delivery of tobacco products to minors. But the record below is barren on that issue, because petitioner proffered no evidence on the issue and, in fact, resisted respondents' discovery as to issues concerning enforcement of the Maine law. Moreover, petitioner's claim fails to account for other means of regulating delivery sales of tobacco that were not challenged by respondents and that remain in force.

In all events, petitioner has not overcome the fact that the state law at issue here unquestionably relates to carriers' transportation and delivery services, in direct contravention of the FAAAA. Commercial transportation of property is vital to the United States economy, as for-hire

motor and air carriers annually transport more than 3.5 billion tons of goods, valued in excess of $4 trillion. In this highly competitive market, carriers stake their reputations on the prompt and efficient delivery of packages because customers judge carriers by their efficiency, price, and service. To reliably and efficiently deliver packages for its customers, carriers such as UPS depend on uniform package-handling processes and procedures for picking up, processing, handling, and delivering packages traveling within the United States, regardless of the State that is the destination. Pet. App. 51. UPS's "delivery operations function as an integrated system, requiring extensive planning and coordination among its operating facilities and ground and air fleet. Delays and disruptions in the sorting and delivery of packages can affect the timely delivery of thousands of packages within the UPS system." *Id.* at 5. The FAAAA was explicitly enacted to free and protect this uniform system of operations from the application of divergent state laws. As discussed below, the Maine law undermines this federal goal by imposing its state law requirements, nowhere contemplated under the FAAAA, that have substantially affected carriers' transportation and delivery services for all shipments within and to Maine.

A. THERE IS NO CONFLICT IN THE LOWER COURTS AS TO THE PREEMPTIVE EFFECT OF THE FAAAA ON STATE TOBACCO LAWS THAT EXPRESSLY REGULATE CARRIERS' TRANSPORTATION AND DELIVERY OF GOODS

1. The Purported Disagreement Between The Decision Below And Rulings Of The Ninth And Second Circuits Is Illusory

The court of appeals, using well-settled federal preemption principles, properly concluded that the FAAAA preempts portions of the Maine Tobacco Delivery Law that regulate whether and how carriers may lawfully provide transportation and delivery services for tobacco products

shipped to recipients in Maine. *See* Pet. App. 21-29. Petitioner attempts to place that ruling in some type of conflict with the precedent of other circuits (Pet. 25-27), but does so by citing FAAAA preemption cases that do not involve state laws that regulate or affect carriers' transportation or delivery services. And in no manner does petitioner demonstrate that the standards applied in those other cases are in conflict with or would lead to a different result in this case.

a. The state laws at issue in the decisions of the Ninth and Second Circuits did not regulate a carrier's transportation or delivery of goods

Maine's Tobacco Delivery Law expressly and directly regulates carriers' transportation and delivery services by prohibiting certain deliveries of tobacco products and dictating the manner in which carriers must make deliveries in order to lawfully deliver tobacco products to consumers in Maine. The Maine law regulates core carrier services – transportation and delivery – and contradicts Congress's expressed concern to permit carriers to have uniform nationwide service to ensure the free flow of goods in interstate commerce. *See* page 1, *supra*. The uncontroverted record established that the challenged provisions have significant effects on carriers' services, including causing one carrier to abandon the service of making lawful deliveries of tobacco products to unlicensed recipients in Maine.

By contrast, the decisions that petitioner invokes in his attempt to create a circuit conflict do not involve regulation of carriers' transportation or delivery services. The Ninth Circuit's decision in *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), addressed an FAAAA preemption challenge to a generally applicable state prevailing *wage* law that required all public works contractors to pay their workers no less than the prevailing rate for similar work in the locality where the public work was performed. *See* 152

F.3d at 1186. The wage law at issue did not regulate carriers' transportation or delivery services in any manner and thus is inapposite to the instant dispute. In fact, the court of appeals explicitly held that the statute was *not* "related to" the contractors' prices, routes, and services within the meaning of the FAAAA because "the effect [of wage laws] is no more than indirect, remote, and tenuous." *Id.* at 1189.

Likewise, the Second Circuit in *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999), considered FAAAA preemption in the context of the local regulation of tow truck "chasing," in which tow trucks monitor accident reports on police radios and then race each other to the scene in hopes of obtaining towing and repair business. *Id.* at 769. Thus, that case did not involve a carrier's transportation or delivery of goods. Indeed, *Ace Auto* did not address the scope of the FAAAA preemption provisions at all, as the parties agreed that the FAAAA "generally preempts state and local regulation of the intrastate towing industry." *Id.* at 771. Instead, the issue presented was whether the regulations at issue fell within the FAAAA savings clauses regarding motor vehicle safety and insurance requirements. *Id.* at 772; *see id.* at 774-775 (holding that savings clauses applied). Because those savings clauses do not apply here, there is no reason to believe that the Second Circuit would reach a different holding concerning Maine's regulation of deliveries than did the First Circuit.

b. Petitioner has not shown that this case would have a different result in a different circuit

The absence of any conflict between the decision below and the rulings of the Ninth and Second Circuits is underscored by petitioner's failure to demonstrate that the application of those decisions to the instant dispute would have made any difference. Petitioner purports to discern a conflict based on different standards applied by

the courts' interpretation of the scope of the term "related to" within the meaning of the FAAAA. Petitioner notes that the court of appeals in the instant case relied on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which interpreted the virtually identical preemption provision of the Airline Deregulation Act of 1978, while the Ninth and Second Circuits relied on this Court's post-*Morales* decisions that narrowed the scope of "related to" in the preemption provision of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a).[4] Petitioner's argument ignores the fact that the *Morales* standard is appropriate for FAAAA preemption (*see* page 19, *infra*).

In any event, any purported difference in the standards pertaining to the proper scope of "related to" for purposes of the FAAAA is irrelevant to the resolution of this case because Maine's regulation of carriers' deliveries would be preempted even under the standard articulated in this Court's ERISA decisions. This Court has held that a "law 'relates to' a covered employee benefit plan for purposes of [ERISA preemption] if it [1] has a connection with or [2] a reference to such a plan." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997) (citation and internal quotation marks omitted, alterations in original). The court below applied an analogous test with respect to both prongs of this standard.

1. The court below held that the challenged provisions of the Maine Tobacco Delivery Law would be preempted if they "either expressly *reference* carrier services or have a forbidden significant effect on UPS' services." Pet. App. 22 (emphasis supplied). This standard is in accord with the reference requirement under the ERISA "related to" provision. Adapting the ERISA standard to the FAAAA, a "reference" exists, and a state law is thus

---

[4] The Second Circuit's citation of ERISA cases in *Ace Auto* is inapposite because the court merely cited those cases as precedent that "[g]uided" its analysis of the FAAAA *savings clauses*, 171 F.3d at 774, not for purposes of determining whether particular state laws are "related to" a carrier's price, route, or service.

preempted, where the state law "acts immediately and exclusively upon [a commercial carrier's price, route, or service] * * * or where the existence of [a commercial carrier's price, route, or service] is essential to the law's operation." *Dillingham*, 519 U.S. at 324-335.

There can be no dispute that application of the ERISA "reference" standard to this case would make no difference. The challenged Maine law expressly seeks to "Regulate the Delivery * * * of Tobacco Products" in Maine. 2003 Me. Laws 444. In fact, the challenged provisions are replete with express references to transportation and delivery services. Section 1555-D defines and proscribes the "Illegal Delivery of Tobacco Products" and makes it unlawful for a person to "knowingly *transport or cause to be delivered*" certain shipments of tobacco products. Me. Rev. Stat. Ann. tit. 22, § 1555-D (emphasis added); *see also id.* § 1555-D(1) (explicitly referencing carriers in requiring the Attorney General to provide lists of licensed and known unlicensed tobacco retailers to "a delivery service"). Section 1555-C(3)(C) also expressly refers to carriers (i.e., delivery services) and the service they provide, requiring that a "delivery sale" of tobacco products – i.e., a sale "delivered by use of a delivery service" (*id.* § 1551(1-B)(B)) – must be shipped via "a delivery service that imposes" specified "requirements," including requiring that the purchaser sign for the shipment. *Id.* § 1555-C(3)(C). This express regulation of carriers' delivery services unquestionably satisfies the "reference" inquiry applied in ERISA cases because the existence of carriers' delivery service "is essential to the law's operation." *Dillingham*, 519 U.S. at 325.

2. Likewise, the application of the ERISA preemption test for whether a State law "has a connection with" an ERISA plan, *Dillingham*, 519 U.S. at 324, would lead to preemption here. As the *Dillingham* Court explained, "to determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,'" and "to the nature of the effect of the state law on ERISA plans." *Id.* at 325 (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656, 658-659 (1995)).

Assuming this standard were applicable to the FAAAA with regard to the preemption of state regulation of a cargo carrier's price, route, or service, the court of appeals below did not depart from it. The court looked at the "structure and legislative history" of the FAAAA to discern Congress's intended scope of preemption (Pet. App. 17; *see id.* at 13-14 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))), and concluded that the challenged provisions were inconsistent with Congress's intent. *See id.* at 17-21.

The challenged provisions of the Maine Tobacco Delivery Law also have a sufficient "connection with" transportation and delivery service to satisfy ERISA standards.[5] By dictating whether, to whom, and how carriers may provide transportation and delivery services for tobacco products, the Maine provisions "function as a regulation of" carrier services, and trigger federal preemption. *Cf. Travelers*, 514 U.S. at 659.

Accordingly, even if there were disagreement between the federal courts of appeals, this Court should await a better vehicle in which to consider such issues, including where the application of a new standard would make a difference to the outcome of the case. Petitioner has no basis to contend that the Ninth or Second Circuits would

---

[5] In applying the "connection with" test under ERISA, the Court has held that a statute that "binds ERISA plan administrators to a particular choice of rules" is preempted under the "connection with" test. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). In contrast, laws that have only an "indirect economic influence" on ERISA plans but do not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself" do not have a sufficient connection with ERISA plans to trigger preemption. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659 (1995); *see also Dillingham*, 519 U.S. at 332, 334 ("prevailing wage statute does not bind ERISA plans to anything" and merely "alters the incentives, but does not dictate the choices, facing ERISA plans").

reach a different result in this case based on their citation of post-*Morales* ERISA cases.[6]

2. The District Court And Intermediate State Appellate Court Decisions Cited By Petitioner Do Not Justify Further Review

Petitioner also cites to district court and intermediate state appellate court opinions, including an unpublished disposition. But these rulings create no conflict and, if anything, reinforce the fact that this Court should allow the issue to percolate until other federal circuit courts and state courts of last resort have had the opportunity to meaningfully analyze and decide the issue.

Indeed, petitioner's reliance upon these decisions is ironic because the First Circuit cited them in its opinion below as consistent with its holding that the portion of Section 1555-D that prohibits the knowing delivery of contraband tobacco products is not preempted. Pet. App. 26-27. The difference in result between those cases and the First Circuit's holding that the imputed knowledge provision of Section 1555-D is preempted is due solely to the application of the law to different *facts*, not the

[6] In addition to the ERISA preemption standard, petitioner relies on the Ninth Circuit's treatment of the FAAAA's legislative history. Petitioner cites the Ninth Circuit's "perception" that Congress did not intend to preempt state prevailing wage laws based on the existence of such laws in ten jurisdictions that Congress did not identify in the legislative history as among those that regulated carriers' prices, routes and services, and the absence of any affirmative indication of Congress's intent to preempt in this "area of traditional state power." *Mendonca*, 152 F.3d at 1188-1189; *see* Pet. 26. Petitioner contends that the court of appeals in the instant case "ignored" that Maine was not identified as a State that regulated carriers' prices, routes, and services, and that Maine had enacted laws regulating deliveries of substances such as wild birds and animals. (Pet. 26; *see id.* at 4 n.1.) The different weight given to one aspect of legislative history by different courts does not create a conflict warranting review by this Court, particularly where, as here, the lower courts were evaluating dissimilar statutes and, as shown above, the standard applied by the purportedly conflicting court would lead to the same result.

application of any legal standard that is different from that of the First Circuit. As such, none of these decisions creates a conflict, much less one worthy of review by this Court.

For example, the unpublished district court decision, *New York State Motor Truck Association v. Pataki*, No. 03-CV-2386, 2004 WL 2937803 (S.D.N.Y. Dec. 17, 2004), addressed a facial challenge to a New York statute that prohibits the knowing delivery of cigarettes to unauthorized recipients, which is similar to the delivery ban set forth in Section 1555-D. Contrary to petitioner's claim, the district court in *New York State Motor Truck Association* did not categorically conclude that there could be no preemption. The court explicitly recognized that carriers might have "to alter their standard way of doing business" to comply with the state law and that such an effect could trigger application of FAAAA preemption. 2004 WL 2937803, at *9. The court declined to find preemption in deciding the particular motion before it, however, because there was no evidence of the statute's effects at that stage of the litigation. *Ibid.* Here, by contrast, the First Circuit relied on evidence of the effects on UPS's services of the imputed knowledge portion of Section 1555-D to hold that portion of the statute preempted.

Petitioner's reliance upon *Ward v. State of New York*, 291 F. Supp. 2d 188 (W.D.N.Y. 2003), is similarly unpersuasive. In that decision, the district court denied a motion for a temporary restraining order and preliminary injunction against enforcement of the same New York statute at issue in *New York State Motor Truck Association*. Thus, on the record before that court, in a proceeding requiring satisfaction of a likelihood of success on the merits standard, the district court found that the plaintiffs had not met their burden. Such a fact-bound determination does not create a conflict of *legal* authorities. Moreover, *Ward* was filed by Indian tribe members involved in the sale of cigarettes and presented *sui generis* issues regarding Tribal sovereignty and Indian rights that are wholly inapposite here. *See* 291 F. Supp. 2d at 196-207.

Finally, petitioner's citation to *Robertson v. Washington State Liquor Control Board*, 10 P.3d 1079 (Wash. Ct. App. 2000), is irrelevant. There, the court held that the FAAAA did not preempt State excise tax statutes that prohibited transportation of contraband untaxed cigarettes and allowed the forfeiture of vehicles used in such transportation. That result is fully consistent with the First Circuit's ruling that the FAAAA does not preempt the portion of Section 1555-D that prohibits the knowing delivery of contraband tobacco products. There apparently was no question of imputed knowledge in *Robertson*, as the plaintiff in that case had "personally hauled" 28,900 cartons of untaxed, unstamped cigarettes into the State on behalf of an Indian Tribe. 10 P.3d at 1081. Likewise, there was no issue regarding effects on carriers' services of imputed knowledge as to the contents of a package, which was the basis for the First Circuit's ruling as to the portion of Section 1555-D that it held preempted.

B. REVIEW IS INAPPROPRIATE BECAUSE PETITIONER'S CLAIM THAT MAINE HAS NO EFFECTIVE MEANS TO COMBAT MINORS' ACCESS TO TOBACCO IS NOT SUPPORTED BY THE RECORD BELOW AND IGNORES AVAILABLE MEANS OF REGULATING TOBACCO SELLERS

Petitioner claims that review is warranted because the First Circuit's decision "leaves delivery sales of tobacco to children unregulated by any government." Pet. 16. That argument does not justify review because it is not supported by the record and also is contradicted by common sense and the assertions of petitioner's own *amici*.

1. The record below is insufficient to support petitioner's claim that the State of Maine is left without an effective means to combat minors' access to tobacco products, making this case a poor vehicle to address the issues raised in the petition for a writ of *certiorari*. Indeed,

the record in this case is devoid of any evidence as to the effectiveness of Maine's regulation of carriers' transportation and delivery services, either absolutely or relative to other means of regulating delivery sales of tobacco products (such as evidence of any decline in delivery sales to minors when the regulations of carriers were put in place).

The inadequate record is due to petitioner's failure to submit evidence on the issue, as well as his resistance to respondents' discovery, including his objections to deposition notices and subpoenas directed to Maine agencies seeking testimony about "efforts * * * made to enforce" or "consideration * * * given to enforcing" the challenged provisions, on the ground that such discovery would invade the "law enforcement deliberative process."[7] As a result, there is no evidence in the record that could support a conclusion that the preempted portions of the Maine law are *necessary* to protect the interests of such minors.

2. In any event, petitioner's argument fails to account for other means of regulating delivery sales of tobacco that are provided in the Maine Tobacco Delivery Law itself. Respondents do not challenge portions of the Maine law that require delivery sale retailers (1) to be licensed; (2) to obtain age verification from purchasers in the form of a copy of a valid government-issued document and to verify that information against a database of government records; (3) to obtain payment by credit card or check if a sale is the result of an Internet advertisement; (4) to mark packages as containing tobacco products; and (5) to report delivery sales to the Maine Bureau of Revenue Services. Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(1)-(2), 1555-C(3)(B),

[7] Petitioner's objections to providing the requested witnesses ultimately were resolved by petitioner's stipulation that the State was enforcing and would continue to enforce the challenged provisions of the Tobacco Delivery Law, and that there was an immediate threat of enforcement "for any carrier coming into the State of Maine." Report of Telephone Conference and Order, July 15, 2004 (Kravchuk, M.J.).

1555-C(4). Respondents also do not challenge the provision of the Tobacco Delivery Law that makes it unlawful to submit required information for a delivery sale in the name of another person. *Id.* § 1555-C(5). Nothing in the First Circuit's decision prevents enforcement of these requirements.[8]

Petitioner thus fails to demonstrate a need for review because he has not shown that Maine's other existing regulations of retailers and purchasers are unenforceable or ineffective, particularly where he has failed to demonstrate the necessity of the preempted provisions. By their very terms, the regulations that are not challenged could be enforced by review of tobacco sellers' websites to determine whether unlicensed sellers offer to sell tobacco products to Maine residents, and sting operations to order tobacco products from such sellers to determine if they comply with the non-preempted state regulations. Indeed, the *amicus curiae* brief submitted by other States reports that California conducted just such an investigation in which children visited web sites in order to attempt to purchase tobacco products. Br. of California and 35 Other States as *Amici Curiae* 3. Nothing prevents Maine from conducting similar investigations and taking enforcement actions against retailers engaged in unlawful delivery sales who, unlike carriers, know the contents of the packages they ship.[9]

To the extent that petitioner believes that state regulation of carriers' transportation and delivery services

[8] The *amici* States' assertion that prohibiting the imputation of knowledge to *carriers* somehow limits States' ability to prosecute *sellers* of tobacco products is unexplained and illogical. Br. of California and 35 Other States as *Amici Curiae* 6.

[9] The *amici* brief of other States also reports that, in California's investigation, nearly 50% of online vendors thwarted underage purchasers who attempted to purchase a carton of cigarettes from their sites. Br. of California and 35 Other States as *Amici Curiae* 3. Maine is free to further regulate online vendors to mandate that they follow the effective methods used by those vendors who successfully thwarted underage purchases.

is essential to combating delivery sales of tobacco products to minors, the decision below permits enforcement against carriers of Section 1555-D's prohibition against knowing deliveries of tobacco products from unlicensed shippers. Pet. App. 24-26. The court of appeals held preempted only the provision of Section 1555-D that imputed knowledge from the shipper's appearance on a list of unlicensed retailers or from markings on a package. *Id.* at 27-28. Petitioner's assertion that imputed knowledge is the only way to prove a carrier's knowing delivery in violation of Maine's Tobacco Delivery Law is without support in the record. Indeed, in the *Robertson* case on which petitioner relies, the State of Washington was able to prove that a trucker transported contraband cigarettes based on his having "personally hauled" those cigarettes, without relying on imputed knowledge. 10 P.3d at 1081.

3. Finally, for the same reasons that petitioner fails to show that he has been left unable to regulate delivery sales of tobacco products, his assertions about his claimed inability to regulate other products (Pet. 16) also lack support and are nowhere presented in this dispute.

This case is not a proper vehicle to review the complex issues presented when States attempt to regulate interstate transportation of *any* commodity. Petitioner fails to acknowledge the limits on the States' role in regulating interstate commerce. *See, e.g.*, *Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*, 223 U.S. 70, 82-83 (1912) ("it is not competent for any State to forbid any common carrier to transport" any commodity that is the "legitimate subject of interstate commerce" because such regulation would be "an unlawful regulation of interstate commerce not authorized by the police power of the State"). Petitioner's reliance on *Granholm v. Heald*, 544 U.S. 460 (2005), is misplaced because that case involved the constitutional authority of the States, pursuant to the Twenty-first Amendment, to regulate the transportation of alcohol. U.S. Const. amend. XXI, § 2. That case did not present a question as to the States' authority to regulate carriers that transport and deliver tobacco and did not address FAAAA preemption of state laws that relate to

carriers' transportation and delivery services. Issues regarding deliveries of other products simply are not presented in this case.

In short, the record below does not support petitioner's assertions that regulating carriers is the only means to limit delivery sales of tobacco products to minors, or even that it is the most effective means. Although it may be easier for Maine to conscript carriers to be the enforcement mechanism for its regulation of tobacco delivery sales, rather than to conduct its own enforcement efforts, Congress has reserved for itself the role of assessing burdens on interstate commerce to determine when to regulate the services of carriers of property. To the extent that Maine has policy arguments about its desire to regulate carriers' services in order to restrict delivery sales of tobacco products, those arguments should be addressed to Congress, which has considered but rejected such regulations in the recent past, rather than the courts.[10]

C. THE FIRST CIRCUIT CORRECTLY HELD THAT THE FAAAA PREEMPTS MAINE'S REGULATION OF CARRIERS' SERVICES

1. Section 1555-C(3)(C) And The Imputed Knowledge Provision Of Section 1555-D Are Related To Carriers' Transportation And Delivery Services

In all events, the First Circuit correctly applied the test used in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which interpreted the virtually identical preemption provision of the Airline Deregulation Act, currently codified at 49 U.S.C. § 41713(b)(1), to determine whether the challenged provisions of the Maine Tobacco

[10] Indeed, to the extent that petitioner's *amici* believe that a "comprehensive scheme" is necessary to control youth access to tobacco products, they confirm that this is a subject for federally uniform legislation, rather than a patchwork of state laws regulating carriers. Br. for *Amicus Curiae* Tobacco Control Legal Consortium, et al. 4-5.

Delivery Law are "related to" a service of commercial carriers of property. Pet. App. 15-17. Despite petitioner's assertions, the test applied by the First Circuit was not "boundless." Pet. 16, 26. In addition to evaluating the challenged provisions' express references and significant effects on service, the court also examined the structure and purpose of the FAAAA. Pet. App. 13-14, 17.

a. There can be little doubt that Congress intended the *Morales* standard to apply to the FAAAA. As the court of appeals noted, "[t]he FAAAA's drafters were familiar with *Morales* and approved of its reasoning." Pet. App. 15. The Conference Committee Report expressly embraced "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83. Congress's intent to adopt *Morales* as the scope of FAAAA preemption must be honored. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (preemption is a matter of congressional intent). Accordingly, this Court's subsequent conclusions that federal preemption under ERISA is more narrow than that recognized in *Morales* for the Airline Deregulation Act do not apply here.

b. Nor does the court of appeals' straightforward application of *Morales* to the instant dispute warrant this Court's review. Petitioner seeks error correction where there is none. The court below examined, as required by *Morales*, the references and effects of the preempted state law and the structure and purpose of the FAAAA.

The court below correctly held that Section 1555-C(3)(C) expressly refers to carriers and the delivery services they provide, thereby satisfying the *Morales* Court's express reference test. Pet. App. 23; *see* pages 9-10, *supra*. With regard to effects, the record below plainly establishes that the challenged provisions of the Maine Tobacco Delivery Law significantly have affected carriers' services.[11]

[11] In no manner are these burdens inchoate. The record before the district court demonstrates that compliance with Section 1555-C(3)(C) requires the "examin[ation] of *every* package" bound for Maine; assurance that delivery of the package, should it contain tobacco

(Continued on following page)

Petitioner does not contest the significant effects on carriers' services established by the record, including that the challenged provisions caused UPS to abandon lawful deliveries of tobacco products to Maine consumers. His attempt to minimize the effects of Section 1555-C(3)(C) by suggesting that some carriers already offer complying adult-signature services (Pet. 16, 23) ignores that Section 1555-C(3)(C) not only requires adult signatures and age verification, but also requires that carriers make deliveries only to the specific addressee and, in all events, is contradicted by the record below.[12] His professed

products, is made "only to the particular addressee (not leaving the package on the porch or with whoever answers the door or with a neighbor or in the office mailroom)"; and the "demand [for a] valid government-issued photo identification showing legal age to purchase tobacco" for any addressee under the age of twenty-seven. Pet. App. 64. Relying on this record, the court of appeals concluded that Section 1555-C(3)(C) imposes substantial burdens and has significant effects on carriers' services. *Id.* at 23 (noting that "[d]elays in searching for the purchaser, making multiple delivery attempts if the purchaser cannot be located, obtaining the purchaser's signature, and verifying the purchaser's age all could affect timely deliveries").

The effects of the imputed knowledge provision of Section 1555-D are no less onerous. The court of appeals reasoned that, by imputing knowledge to a carrier for deliveries of packages shipped by a retailer on the Attorney General's list or marked as containing tobacco products, Section 1555-D "has the effect of forcing UPS to change its uniform package-processing procedures." *Id.* at 27-28. Compliance with state law thus had the effect of forcing carriers to: "specially inspect every package destined for delivery in Maine"; segregate all packages containing tobacco products; and then research those packages to determine whether the recipient is licensed (and therefore authorized to receive the package). *Ibid.*

[12] *See* Statement Of Undisputed Material Facts In Support Of Plaintiffs' "As Applied" Motion For Summary Judgment ¶ 38-44. Petitioner's *amici* likewise ignore Section 1555-C(3)(C)'s requirement of personal delivery to the addressee. *See* Br. for *Amicus Curiae* Tobacco Control Legal Consortium, et al. 8. As to Section 1555-D, petitioner asserts that UPS already checks the outside of packages for some purposes (Pet. 24), but fails to contest the significant effects on carriers' services of having to identify packages marked as containing tobacco products or shipped by retailers on the Attorney General's list, as

(Continued on following page)

inability to see how Section 1555-C(3)(C) "*regulates* the service provided by carriers" (*id.* at 23 (emphasis supplied)) is immaterial in light of the provision's undisputed effects on carriers' service. *See Morales*, 504 U.S. at 386 (rejecting argument that "only state laws specifically addressed to the airline industry are pre-empted" by the Airline Deregulation Act); *id.* at 388 (significant effects test).

2. The Challenged Provisions Are Preempted Even Though Enacted In Part To Promote Health

Petitioner contends that the challenged provisions of the Maine Tobacco Delivery Law are outside the scope of the FAAAA because they are not "*economic* laws." Pet. 20. Petitioner's attempt to limit FAAAA preemption to state laws enacted exclusively for the purpose of imposing economic regulations on carriers is contrary to the text and purpose of the FAAAA's express preemption provisions.

a. The text of the FAAAA preemption provisions is expansive and is by no means limited to state economic regulation. Rather, the FAAAA preempts "*a law, regulation, or other provision having the force and effect of law*" related to a carrier's price, route, or service. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (emphasis added).

The breadth of this provision is confirmed by the very fact that the FAAAA saves from preemption certain types of state law.[13] Each of the four matters listed in the FAAAA

established by the record. Petitioner's conjecture about UPS's ability to develop a means of complying with the Maine Tobacco Delivery Law (Pet. 11-12) is immaterial, because the issue is whether the challenged state law is "related to" carriers' service, not whether it is technologically conceivable, at some unknown cost, to alter services to comply with state law.

[13] The House Conference Report indicates that the savings clauses were not "all inclusive," but merely identified "some of the matters which are not 'prices, routes, or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84. Nothing in the savings

(Continued on following page)

savings clauses, 49 U.S.C. §§ 14501(c)(2)(A) and 41713(b)(4)(B)(i), was, and is, the subject of a statutory grant of congressional authority to permit State regulation within defined limits. *See* 49 U.S.C. § 5125 (transportation of hazardous cargo), § 14504 (minimum amounts of financial responsibility related to insurance), §§ 31111-31113 (restrictions on size of motor vehicles), § 30103(b) (motor vehicle safety standards), §§ 31131-31147 (commercial motor vehicle safety). Thus, Congress used the "Matters Not Covered" to clarify that the authority granted by those other statutes was not repealed by the FAAAA. Petitioner's attempt to create broad new exemptions from preemption for all health- and safety-related laws is inconsistent with Congress's having drafted exemptions. If the FAAAA were confined to preempting state economic regulation, the savings clauses would have been superfluous.

Petitioner, in effect, asks this Court to rewrite the FAAAA to substitute the words "economic regulation" for the phrase "law, regulation, or other provision having the force and effect of law." But this request ignores that "the plain wording of the clause * * * necessarily contains the best evidence of Congress's pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (same). Petitioner likewise ignores that any departure from the text is a matter to be taken up by Congress, not the courts. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 n.51 (2001) (complaint about scope or application of Americans with Disabilities Act "is a complaint more properly directed to Congress, which drafted the ADA's

clauses themselves or in that reference in the legislative history suggests, however, that Congress *sub silentio* intended to immunize wholesale an entire category of state laws from the scope of preemption, as petitioner would have it, regardless of their effects on price, route, or service. Indeed, under petitioner's view, the savings clause for motor vehicle safety would be surplusage, as there would be no need to exempt any forms of non-economic regulation from the scope of preemption.

coverage broadly"); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("parties should not seek to amend the statute by appeal to the Judicial Branch"); *United States v. James*, 478 U.S. 597, 612 (1986) (if unambiguous statute "is to be changed, it should be by Congress and not by this Court").

b. Moreover, restricting FAAAA preemption to state "economic regulation" would reintroduce the very inefficiencies Congress intended to eliminate. H.R. Conf. Rep. No. 103-677, at 86-87 (expressing the need to eliminate the inefficiencies cause by the "patchwork of regulation" – including restrictions on the "types of commodities carried" – that had created a "huge problem for national and regional carriers attempting to conduct a standard way of doing business"). Carriers not only would have to consult state and local laws to determine whether and how they could deliver particular commodities, they also would have to determine the particular *motivation* underlying those laws to determine whether they were "economic regulation" (and therefore preempted) or enacted for some other purpose (and therefore not preempted). This task would be particularly difficult in light of the mixed motivation underlying some state regulations, such as the dual tax and health purposes underlying Maine's Tobacco Delivery Law. *See* Pet. App. 39. Subjecting carriers' services to varying state policies is inconsistent with the uniformity that Congress sought to achieve. *Cf. American Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5 (1995) (applying analogous preemption provision of Airline Deregulation Act) (" 'States may not seek to impose their own public policies . . . on the operations of an air carrier.' ") (citation omitted).

c. Petitioner's reliance on *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), is unavailing, as the preemptive reach of the FAAAA was not before the Court in that case. Rather, the Court there analyzed whether Congress intended States to delegate to localities the authority preserved by the motor vehicle safety savings clause of the FAAAA. In holding that delegation was permitted, the Court concluded that

Congress designed that savings clause "to ensure that its preemption of States' economic authority over motor carriers of property" would "'not restrict' the preexisting and traditional police power over safety," which "typically includes the choice to delegate" authority to local governments. 536 U.S. at 439-440. Indeed, in most circumstances this Court initially presumes that traditional state police powers are not preempted, even if the Court subsequently concludes that Congress intended for preemption to apply. As such, petitioner's attempt to seize upon this reference as putative support for his contention that FAAAA preemption is limited solely to state economic regulation significantly overstates the *City of Columbus* holding.

Moreover, under petitioner's view, even where, as here, Congress has broadly preempted a "law, regulation, or other provision having the force and effect of law," preemption would be limited solely to the specific manifestation of the problem that motivated Congress to act. This Court has rejected such arguments that Congress must have contemplated a particular application of a law for the law to apply, holding that "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-212 (1998) (citation omitted) (plain language of Americans with Disabilities Act applies to state prisoners even if unintended by Congress); *Morales*, 504 U.S. at 385 n.2 ("legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning").[14]

[14] Petitioner fails to show that application of FAAAA preemption to regulation of carriers' deliveries of tobacco products is inconsistent with the Synar Amendment, 42 U.S.C. § 300x-26, which conditions certain federal grants to States on their having enacted laws prohibiting sales of tobacco products to minors. Pet. 22. As the court of appeals correctly concluded: "The FAAAA and Synar Amendment can exist harmoniously because the states may pass laws to curb underage smoking without

(Continued on following page)

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

PAUL T. FRIEDMAN
RUTH N. BORENSTEIN
LAWRENCE R. KATZIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Tel.: (415) 268-7000
Fax: (415) 268-7522

BETH S. BRINKMANN
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
Tel.: (202) 887-1544
Fax: (202) 887-0763

Counsel for Respondents

November 29, 2006

passing laws 'related to' carrier prices, routes, or services." Pet. App. 21 n.12. Petitioner also relies on Congress's silence about pre-existing Maine contraband delivery laws (Pet. 22), but there is no evidence that Maine, or any other State, ever enforced such restrictions against carriers or that Congress was aware of, much less intended to endorse, any purported enforcement of such laws.